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ABSTRACT

"The Speaker," a film about the First Amendment concept of freedom of expression, deals with the personal torment that individuals experience in learning tolerance for ideas they fear or reject. This discussion guide for the film is intended for teenage through adult audiences and is designed to provoke discussion on the issues surrounding freedom of expression. The major portion of the guide contains an abridged version of the article, "How Much of Our Speech Is Free?" by Franklyn S. Haiman--a chronological discussion of Supreme Court decisions on issues related to the First Amendment. Other sections include background for the discussion moderator, preparation of facilities before showing the film, a bibliography, and eight pages of discussion suggestions. (HAI)

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THE SPEAKER

A Film About Freedom

DISCUSSION GUIDE

FOR TEACHERS AND GROUP MODERATORS

OFFICE FOR INTELLECTUAL FREEDOM
AMERICAN LIBRARY ASSOCIATION
CHICAGO 1977

US 802 019

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

—The First Amendment

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PREFACE

"The preservation of the sacred fire of liberty, and the destiny of the republican model of government," George Washington once remarked, "are justly considered as *deeply*, perhaps as *finally*, staked on the experiment entrusted to the hands of the American people."

The Speaker is about the sacred fire of liberty—specifically, the freedom of expression—and the experiment still in our hands. It portrays the potential we face each day for the gradual suffocation of the fire, and it is a graphic reminder that the American experiment may fail without constant reeducation and rededication.

For nearly forty years the American Library Association has devoted efforts to the protection of our freedom of expression as guaranteed by the First Amendment. In 1939 the ALA Council adopted a statement of the Des Moines Public Library entitled the Library's Bill of Rights. Confronted with growing winds of intolerance, the ALA modified the statement to suit a national constituency, and through modification it became the Library Bill of Rights. The Library Bill of Rights is our basic policy of library service, it affirms our belief that libraries must provide service of the highest quality to all, that their facilities must be open to all, and that no one should regulate what others read.

The ALA Intellectual Freedom Committee was established in 1940 and charged with responsibility for recommending necessary steps to safeguard the rights of library users in accordance with the First Amendment and the Library Bill of Rights. Through the Intellectual Freedom Committee, the Association has promoted the right of all Americans to have access to materials which reflect all points of view—no matter how repugnant some views may be to various segments of society.

In 1975, the Intellectual Freedom Committee decided to produce audiovisual materials on the freedom of expression. The Committee's first step into the world of multimedia resulted in the production of a slide presentation on the history of the First Amendment and its relation to libraries. That presentation, "Freedom in America: The Two-Century Record," has been modified and is now available as a sound filmstrip (see inside back cover).

At the same time the Intellectual Freedom Committee began to explore the possibility of producing a film on the First Amendment in contemporary U.S. society. After considering many filmmakers, the Committee unanimously

chose Lee R. Bobker of Vision Associates because of his enthusiasm for the project, his conviction of its importance, and his record of excellence as a filmmaker. His determination, combined with a generous grant from Beta Phi Mu and funds received from libraries willing to support production of the film through pre-release orders, assured the completion of the project.

We are proud of *The Speaker*, but we are also aware that it addresses one of the most sensitive—but doubtless one of the most important—aspects of freedom of expression: toleration of ideas we find offensive or repugnant. Ultimately, such tolerance derives from a complicated process involving both our reason and our emotions. It is our hope that *The Speaker* will make a major contribution to this process.

In any project such as this, there are dozens of people and organizations to be thanked. In particular, we want to express our gratitude to Lee Bobker, for his ability to make our shared vision a reality; to Mildred Dunnock, one of America's most distinguished actresses, for all that her singular talents contributed to the film; to Beta Phi Mu, for its faith in the project; to the students and teachers at Sunnyvale High School, and the communities of Sunnyvale and San Jose, California, for their superb cooperation and assistance in the filming.

We also want to thank those scholars and authorities who generously shared with us their views on the First Amendment during the period of our research: Mr. Floyd Abrams, Judge Griffin Bell, Prof. Henry Steele Commager, Prof. Archibald Cox, Prof. Thomas Emerson, Prof. Ernest van den Haag, Mr. Nat Hentoff, Mr. Gerard Piel, Mr. Joseph Rauh Jr., Judge Paul Reardon, Mr. Charles Rembar, and Judge J. Skelly Wright.

Finally, we want to acknowledge our indebtedness to the many libraries that supported our project through pre-release purchases of the film.

FLORENCE McMULLIN
Chairperson, ALA Intellectual Freedom Committee

JUDITH F. KRUG
Director, ALA Office for Intellectual Freedom

CHICAGO
April 1977

USES OF THE FILM

The Speaker is a film for

General Adult Audiences

Civic Groups, especially those devoted to discussion of public issues

Members of Governing Boards, particularly those with First Amendment responsibilities

- Library trustees
- Public school boards

Students, in high school and college/university classes on

- Communications
- Government
- History
- Library science
- Social studies

Staff, especially staff training and continuing education in libraries

The Speaker is a film not only about the concept of freedom of expression, but also about the personal torments each of us experiences in learning tolerance for ideas we detest. Because this emotional aspect of freedom of expression cannot be ignored, the value of *The Speaker* will depend upon its ability to allow people to think and talk openly about their own experiences—and their personal reservations.

To judge the effectiveness of the film in provoking fruitful discussion of the issues surrounding freedom of expression, the discussion moderator may want to ask members of the viewing audience about their perception of the First Amendment.

- **Before** the film is shown, ask the audience: Under our kind of government, what role does the First Amendment play? In what ways does it reach into your daily life?
- **After** the film has been shown and the group discussion is nearly over, ask the audience to describe how their views were changed—or not changed—by the film and the discussion.

The American Library Association would like to learn about reactions to the film and its effectiveness. Discussion moderators are encouraged to report to: Office for Intellectual Freedom, American Library Association, 50 East Huron Street, Chicago, Illinois 60611.

BEFORE SHOWING THE FILM

1. Background for the discussion moderator

To insure the most rewarding results, it is suggested that the moderator

- Preview the film.
- View the sound filmstrip "Freedom in America: The Two-Century Record." This filmstrip provides a capsule history of the First Amendment since its adoption in 1791. (For filmstrip order information, see inside back cover.)
- Read the overview "How Much of Our Speech is Free?" (pp. 17-28). Franklyn Haiman's article surveys the current status of First Amendment rights.
- Set goals and objectives for the meeting.
- Evaluate the audience—their interests and background—so the discussion can be focused on issues of concern to them.
- Review the suggestions for discussion (pp. 9-16).

2. Preparing the facilities

The site of the meeting and the equipment should be chosen carefully.

- In choosing a room for the meeting, consideration should be given to the fact that a film will be used. It should be a room with good acoustics (avoid rooms in which a lot of outside noise can be heard) and one that can be completely or almost completely darkened.
- Obtain a 16 mm sound projector in good condition. If possible, the speaker unit for the film projector should be completely separate from the body of the projector. Test the projector before the showing for picture and sound quality as follows:
  A. Before threading the film, turn the projector on and be sure the frame on screen is free of dust and dirt around the edges. If not, use a clean white cloth to clean the gate area through which the light is projected.
  B. Thread the film, carefully following the instructions and/or threading diagram usually attached to the projector. Run a small

segment of the film, focusing the lens for maximum sharpness and adjusting the sound controls for best listening results. If the sound is distorted, re-thread the film, being sure the sound runs tightly around the sound drum.

- Be sure no one can block the image by sitting in front of the projector.

3. Preparing the audience

To prepare the audience for the film and the discussion, the moderator can

- Reproduce materials on the First Amendment.

  Program announcements and meeting handouts should include the text of the First Amendment (many in the audience will be unfamiliar with its wording) and a few provocative questions:

  Are some ideas too dangerous for expression—even in an open society?

  Should the majority restrict the expression of the minority in time of crisis?

  For adults, a brief bibliography of materials available through a local library may be useful. (An annotated bibliography appears on pp. 29-31.)

- Prepare brief introductory remarks. For example:

  "Today, we are going to view a film about the First Amendment. Adopted in 1791, the First Amendment grants us freedom of belief, freedom of speech, and freedom of the press.

  "The language of the First Amendment is seemingly absolute. 'Congress shall make *no* law . . . ' However, many people, including justices of the Supreme Court, have believed that the First Amendment must be restricted in times of danger, as well as 'balanced' against other rights.

  "In viewing the film and in discussion among ourselves, we will explore some basic questions posed by the First Amendment, and perhaps discover something about our own conceptions of basic constitutional rights."

SUGGESTIONS FOR DISCUSSION

The main responsibility of the discussion moderator is to keep the discussion focused on the theme of the program, and to draw the members of the audience into the exchange of questions and comments.

The moderator does not have to have answers for every question. Rather, members of the audience should be encouraged to suggest their own answers and evaluate them.

If the discussion lags, the moderator should be ready to present new discussion ideas. There are probably too many questions in this guide for use at one session, so the moderator should select those best suited to the goals and objectives established for the meeting.

During the discussion, one or two persons may be particularly effective in continuing the film's various arguments *against* allowing Boyd to speak. They should be encouraged to pose additional questions, and others in the group should be encouraged to respond.

At a crucial point in the discussion, the moderator should be ready to ask the basic question posed by the film: What ideas do *you* believe are dangerous? What restriction would *you* place on discussion of those ideas? Would *you* totally ban discussion?

Remember: discussion of the First Amendment often remains academic until individuals are asked to tolerate free expression for ideas which they fear or dislike. What the group discussion should show is that every controversial idea has its enemies, and that suppression of one controversial idea may lead to the suppression of all.

During the first meeting of the Current Events Committee, Samantha says: "The reason we're talking about inviting Dr. Boyd is because we believe—at least I think we all believe—that it's important to hear all points of view. It's not a question of whether or not we agree with him."

- If Dr. Boyd's ideas are clearly offensive to many members of the community in the film, why would it be important for them to hear his point of view?

- Some people think speech should be limited when it could lead to action that is clearly dangerous. How could a speaker like Boyd endanger the community?

- Consider Jenny's reactions during the discussion of Dr. Boyd. What subject would make you oppose a speaker with an equally strong reaction?

- If the majority in a community has the right to "protect" itself from minority opinions, would, for example, Dr. Martin Luther King Jr. have been permitted to express views that were clearly unpopular in many communities?

Marty says: "Everybody deserves at least a hearing. . . ." Corinna suggests that Boyd's speech might be so ridiculous that no one will believe him.

- If certain ideas are clearly worthless or dangerous—for example, Hitler's anti-semitism—what is the point in hearing them?

- Was Victoria Dunn wise in allowing her students to decide the question of Dr. B >yd for themselves?

- What is the role of dissent in our society? What ideas accepted today were rejected as worthless when they were first introduced?

- Does our system protect only "safe" ideas? How can the system protect the expression of ideas which seem to threaten its existence?

Recall Victoria Dunn in her classroom at the opening of the film: "The contrast between Lincoln and Douglas couldn't have been greater. The issue they debated, as you know, was . . . slavery."

- Ask the audience to think of a single-word description of Victoria Dunn.

- What kind of teacher was she? Was she too confident that she was right? Was she too rigid?

- What kind of relationship did Victoria Dunn have with her students?

- If you were the teacher, would you have let the students invite Boyd?

- Why did Victoria Dunn feel so strongly that Boyd should be allowed to speak despite the fact that she disagreed with his ideas?

A group of students in the film react angrily to the announcement of Boyd's speech. They destroy a poster.

- How far should an educational program go in introducing provocative ideas, or even controversial themes? If a line is to be drawn, who should draw it?

Betty says: "Boyd's ideas should be aired before mature audiences. I know my students. In my classes we discuss all sorts of things that arise out of the literature we read, but this thing is just too hot to handle."

- When young people are involved, how much does the fact that they are young influence our judgment about what they ought to hear?

- What are the common ways in which we restrict minors in order to protect them?

- What happens when a school—or society itself—becomes very protective?

Joan says to Stan: "The point is a lot of people—the majority—don't want Boyd's questions raised here and I think you have to honor that majority."

- The leaders of the community in the film clearly wanted to maintain racial harmony, a desirable goal. How do you feel about their conclusion that Boyd's freedom of speech was less important than this community goal?

- How do you perceive Betty and Joan in terms of their commitment to freedom of expression?

- What happens when we begin to balance rights like freedom of speech against the goals of the majority?

- Does the minority have the protection of the Bill of Rights only so long as they don't provoke the majority?

Victoria Dunn says to Betty: "You know, life consists of many unpleasant things. We can't go through it shutting our ears. I've always taught my students, and I am sure you've taught yours in English, that the more ideas they're exposed to the better, and that includes painful ideas."

Betty responds: "I agree with you, Victoria, in principle, but when you read a book or when we discuss it in class we're in a controlled environment. It's one thing to read something and another thing to hear it aired publicly."

- Betty believes there is an insult to black students which is implicit in Boyd's opinions. Is there a danger in halting public discussion for such a reason? Why doesn't Victoria Dunn agree with Betty?

- What is the difference between "discussion in a controlled environment" and public discussion?

- Can minors really be protected from all "dangerous" ideas?

- When should parents and teachers begin to trust the judgment of their children and students? How will minors learn to exercise their judgment if they are never exposed to controversial opinions?

Recall Tom's angry conversation with Corinna in the courtyard of the school.

- Ask the audience to describe Tom's reaction.

- Ask the members of the audience to imagine an issue that would provoke an equally strong reaction in them. Ask individuals about those issues. What protection would they give the discussion of "provocative" ideas?

Principal Newcombe joins Victoria Dunn in her classroom. Newcombe says: "I agree—Boyd is entitled to his theories—but I think the risks of letting him speak *here* are too great, and *here* is my concern."

- How would *you* try to persuade Newcombe to allow Boyd to speak?
- Did Newcombe exaggerate the danger posed by Boyd in order to influence Dunn and the Current Events Committee? When in our history has the danger of free speech been exaggerated in order to limit freedom of expression?
- In what ways does the need for law and order in a society limit the exercise of rights? Think of an example from your own experience in which freedom of expression seemed to pose a threat.

After Principal Newcombe meets with the Current Events Committee, Dunn asks the students if they wish to cancel Boyd's appearance.

- Recall Jenny's silence at the meeting. What might Jenny have been thinking about her own rights?

Two community leaders meet with the editor of the city paper to discuss his coverage of the PTA meeting.

- Should the media be free to print or broadcast anything whatsoever?
- What special responsibilities do the media have for
  Privacy of the individual?
  An indicted person's right to a fair trial?
  Secrecy in governmental operations?
  Goals of the community (e.g., racial harmony)?

Two parents meet with the librarian in the school media center. They tell the librarian: "Removing a couple of magazines from the shelf is hardly censorship. Suppose you had never selected the magazines that carried these articles on Boyd in the first place. It's not censorship—it's selectivity."

- What is the difference between censorship and selection?
- If Dr. Boyd had not been invited to speak at the school, what reason would there have been to keep information regarding him out of the media center?
- Should every reader have access to every book? What limitations should be imposed? Who should decide?

At the meeting of the Current Events Committee with the president of the school board and the community leaders, the Rev. Stewart says: "The point is, when you give someone like Boyd the opportunity to speak, you run the risk of legitimatizing his views. . . . It makes what he says more respectable."

- What do you think about the Rev. Stewart's claim that Boyd's appearance would establish racism as a bona fide area of discourse?
- How would you describe the attitude of the community leaders toward the students?
- Why do you think the students at the meeting all voted in favor of allowing Boyd to appear?
- Jane Stock argues that it is sometimes necessary to compromise the First Amendment in order to avoid danger. What harm could come from a compromise? How would you answer Jane Stock?

Consider the scenes between the Current Events Committee's decision to invite Boyd and the decision at the end of the film to cancel his appearance.

- How did the events in the film affect the lives of the

people in it? What does the film show us about the way freedom can be lost?

- Ask the audience to discuss the repercussions of the Boyd controversy:

  New guidelines for the student editor.
  Pressures on the school librarian.
  The decision of the city library board to cancel a speaker on legalization of marijuana.
  Pressures on the editor of the newspaper to withhold reports on the controversy.

- Do the community leaders really believe in the First Amendment? What are their reservations? Yours?

- What steps could the Current Events Committee have taken to diminish the controversy in a manner consistent with the First Amendment?

- What happens when a society fails to deliver on its commitments and accepts the loss of principles which are fundamental to its existence?

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Additional Suggestions for Discussion

1. Should libraries be free to circulate communicative materials without restriction?

   Are some persons so susceptible to certain ideas that they need special protection?

   Who should decide which ideas are too dangerous for general dissemination? Who should decide which people need "protection"?

   How can a librarian respond to a majority of the community who say that they don't want their tax dollars spent on materials containing ideas they oppose?

2. What special circumstances in the public schools limit the freedom of expression of teachers and students?

What circumstances make it necessary for the teacher to distinguish between professional comments on curricular subject matter and personal comments? How does the teacher distinguish between the two?

What responsibilities does a student have to other students?

What factors, if any, distinguish the student newspaper from the newspaper in the community? Does the student editor have special responsibilities that the editor of the community newspaper does not?

How Much of Our Speech Is Free?

By FRANKLYN S. HAIMAN, chairperson of the department of communication studies at Northwestern University, where he has been on the faculty since 1948. Haiman founded the Speech Communication Association's Commission on Freedom of Speech and led the movement to introduce free speech concerns into the curriculum and research of college speech departments. He was president of the American Civil Liberties Union's Illinois division from 1964 to 1975. He is the author of Freedom of Speech *(1976) and of the ACLU pamphlet, "The First Freedoms: Speech, Press, and Assembly." "How Much of Our Speech Is Free?" has been abridged for publication here. It first appeared in* The Civil Liberties Review.

The late Supreme Court Justice Hugo Black never tired of proclaiming that our Founding Fathers meant literally what they said in the First Amendment—that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." For more than twenty years Justice Black consistently opposed all restrictions on allegedly obscene and libelous speech, and was the Court's most vigorous spokesman for the rights of dissenters against a variety of national security claims.

Yet, in 1966 Justice Black wrote the majority opinion sustaining a trespass conviction of civil rights activists for peacefully demonstrating on the grounds of a Tallahassee, Florida, jailhouse.[1] He was also among the dissenters from a landmark 1969 ruling that upheld the right of students to wear antiwar armbands in a public school.[2] And shortly before his death in 1971 he agreed with a dissenting opinion of Justice Harry Blackmun that a young man wearing a jacket with "Fuck the Draft" emblazoned on it had engaged in "mainly conduct and little speech."[3]

If even Justice Black, the Great Absolutist, was finally not all that absolute about the First Amendment, there is little wonder that other interpreters have found various meanings in its provisions. Particularly in the last 50 years, scholars and lawyers have argued over the limits on speech, if any, that the Constitution allows. In our own time, as we shall see, the debate continues as new modes of expression lay claim to the protections of the free speech clause of the First Amendment.

Zechariah Chafee, Jr., the leading American free speech scholar of the

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1940s, believed that when the Founding Fathers wrote the First Amendment their primary purpose was "to wipe out the common law of sedition," which had allowed British kings to punish citizens for political dissent, and that under the Amendment's protective umbrella such political trials in America would be foreclosed.[4] Chafee did not agree with the narrow view, based on Blackstone's *Commentaries*, which held that the First Amendment was intended to prohibit only prior restraints on speech and press. Nor did he embrace the broad view, which has gained some acceptance in more recent times, that the First Amendment extends protection to all expression, leaving only overt anti-social physical behavior outside its umbrella. Indeed, it was the generally liberal Chafee who propounded the notion, later accepted by the U.S. Supreme Court, that some expression, like profanity, is so devoid of ideas and akin to a physical blow against its target that any possible value it may have is "outweighed by the social interests in order, morality, the training of the young, and the peace of mind of those who hear and see"—in short, that it is not protected by the First Amendment.[5]

The concept that speech may lose its First Amendment protection when it conflicts with other important social interests is also implicit in the famous "clear and present danger" doctrine of Justice Oliver Wendell Holmes. The doctrine provides that speech may be restrained or punished when it poses a clear and present danger of bringing about "substantive evils" which the state has a right to prevent. Ironically, many civil libertarians use this doctrine as the standard around which they can best rally in defense of freedom of speech. They typically argue, of course, that the speech they are defending poses no clear and present danger of provoking illegal acts. But Justice Holmes himself was aware of the ways in which his test could be stretched to allow for the punishment of speech that was only remotely connected to a potential evil. In 1925, dissenting from the Supreme Court's affirmation of a New York conviction for the writing and distribution of a piece of radical literature, he wrote:

> It is said that this Manifesto was more than a theory, that it was an incitement. Every idea is an incitement. It offers itself for belief, and, if believed, it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result.[6]

It was left to Alexander Meiklejohn, the great philosopher of freedom of speech, to argue in 1948 that the clear and present danger test was inherently defective and that it opened doors that should remain firmly shut. Meiklejohn would have nothing to do with a doctrine that protected "mere academic and harmless discussion" but provided no real "defense to men who plan and advocate and incite toward corporate action for the common good."[7] He believed that since the people in a democracy are sovereign they must be sufficiently well informed to make political decisions, and that, therefore, they must hear everything political that anyone has to say—including speech that favors destruction of the very system which protects it. So long as speech has anything to do with the process of self-government, Meiklejohn would have given it the absolute protection he felt the First Amendment required.

Yet even Meiklejohn had his less favored categories of expression—those which involve the "needs of many men to express their opinions" on matters unrelated to the processes of self-government.[8] This kind of expression, he maintained, has nothing to do with the freedom of speech discussed in the First Amendment; it is, rather, a part of the "life, liberty, or property" clause of the Fifth Amendment with which government could interfere by "due process of law."[9]

Believing that neither Meiklejohn nor Chafee nor Justices Holmes or Black expounded a theory of the First Amendment expansive enough to encompass all the expression that

merits coverage, Thomas Emerson, our most eminent contemporary free speech scholar, has proposed a "full protection" theory of freedom of speech.[10] Emerson's doctrine harks back to the Jeffersonian view that "It is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order."[11] Emerson proposes that everything which is defined as "expression" be absolutely free, and that only "action" be subject to government control.

Emerson's view of expression is broader than that of Justice Black; it includes such physical acts as picketing, the public burning or turning in of draft cards, and flag desecration, all of which Justice Black had excluded. Still, Emerson sets limits. For example, he classifies as "action" rather than "expression" obscene telephone calls, threatening gestures, disruptive heckling, sit-ins, commands or instructions related to immediate lawless acts, and wartime broadcasts for an enemy. . . .

The philosophers and practioners of the law who have debated the scope and meaning of the First Amendment have typically invoked the words and practices of the Founding Fathers to support one position or another. However, in 1960 Leonard Levy convincingly undermined almost all of the conventional wisdom on this subject in an exhaustive study of the historical background of the free speech clause.[12] Levy found little evidence to support either the Chafee view concerning the Founding Fathers' wish to abolish the law of sedition or the Black view that the adopters of the First Amendment meant absolutely and literally what they said. Indeed, Levy's research led him to conclude that the framers "neither said what they meant nor meant what they said" in writing the free speech clause.[13] Levy reminds us that "the Framers had a genius for studied imprecision"[14] and suggests that scholars would be well advised to forget about seeking guidance from them in their attempts to find satisfactory contemporary meanings for the freedom of speech clause. If they intended anything, Levy says, it was that each generation be free to adapt the provisions of the Constitution to the needs of its own day.

The wisdom of leaving to each era the working out of its own interpretation of the First Amendment is well illustrated by developments in our own time. Twentieth-century America has produced new conflicts over freedom of speech which require new understandings of our constitutional rights. There are three areas, in particular, in which changing communication mores have placed strains upon the traditional interpretations of the First Amendment. One is the issue of whether nonverbal communication is "speech" entitled to First Amendment protection. Another is the question of whether protected speech must contain political or social "ideas." The third is the debate over whether state intrusion into the communications marketplace, even for the avowed purpose of increasing diversity, constitutes "abridgment" of speech, which is prohibited by the First Amendment.

NONVERBAL COMMUNICATION

So long as nonverbal modes of social protest were relatively rare, the Supreme Court had little difficulty in recognizing them as forms of "speech" entitled to First Amendment protection. As early as 1931, in an opinion written by Chief Justice Charles Evans Hughes, the Court struck down a California statute that had made it a crime to fly a red flag "as a sign, symbol, or emblem of opposition to organized government." Chief Justice Hughes suggested that such behavior was part of the "free political discussion" which is a "fundamental principle of our constitutional system."[15]

The Court was even more explicit in its acceptance of nonverbal dissent as protected by the First Amendment when it held, in 1943, that the West Virginia public schools could not compel the children of Jehovah's Witnesses to participate in a daily ritual of saluting the American flag. Although the Witnesses had objected to this ritual as a violation of their religious beliefs, the Supreme Court decided the case on free speech

grounds. Justice Robert Jackson spoke for the majority when he said:

> There is no doubt that, in connection with the pledges, the flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas . . . a short cut from mind to mind. . . .[16]

In 1963 a nearly unanimous Supreme Court described a peaceable assembly of 187 black students on the grounds of the South Carolina state capitol as an exercise of First Amendment rights "in their most pristine and classic form."[17] And as recently as 1969 a majority of the justices could agree that the wearing of black armbands to school in protest against the Vietnam War was clearly "the type of symbolic act that is within the Free Speech Clause of the First Amendment."[18]

But the 1960s had produced a new communication scene in the United States. The civil rights and antiwar movements, finding themselves unable to attract sufficient attention to their causes by relying on traditional modes of persuasion, began changing their tactics. The verbal rhetoric of these movements became increasingly militant and vituperative. At times words were abandoned altogether in favor of body rhetoric. Activists discovered that their messages aroused a greater response when they were communicated nonverbally—by a mass march or an assembly, by a sit-in, pray-in, or swim-in, by a public draft card or flag burning, or even by a self-immolation.

These new communication tactics did not emerge without ideological underpinnings, although the protesters may not all have been conscious of the deeper implications of their behavior. As early as the 1950s, sensitivity training programs—forerunners of the more recent encounter group movement—had been teaching sizeable numbers of opinion leaders in colleges and universities, business and industry, and community organizations that our culture is "hung up" on over-intellectualization and over-verbalization, and that a good, healthy "Bullshit" or bear hug might be worth a thousand elegant words.

As "speech without words" became an ever more common mode of dissent, the public reacted, and the Supreme Court, ever sensitive to the public mood, was also soon to respond. In 1965, confronted with a case involving a civil rights march to the courthouse in Baton Rouge, Louisiana, the Court began to back off from its earlier acceptance of nonverbal communication. Though reversing the convictions in the particular case, the Court felt it necessary to fashion a distinction between "pure speech" and "speech plus," with the latter granted a lesser degree of First Amendment protection than the former:

> We emphatically reject the notion urged by appellant that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech.[19]

The following year, in another Louisiana civil rights case involving a library sit-in, the Court again reversed the convictions, but only three of the Justices (William O. Douglas, Abe Fortas, and Earl Warren) were willing to join in the opinion that First Amendment rights "are not confined to verbal expression. They embrace appropriate types of action which certainly include the right in a peaceable and orderly manner to protest by silent and reproachful presence, in a place where the protestant has every right to be."[20]

By 1968, when public draft card burning reached the high court, all but Justice Douglas were ready to turn back the nonverbal tide. Even while admitting that David O'Brien's behavior in burning his draft card on the steps of the South Boston courthouse may have had a "communicative element," Chief Justice Warren's majority opinion admonished:

> We cannot accept the view that an apparently limitless variety of conduct can

be labelled "speech" whenever the person engaging in the conduct intends thereby to express an idea.[21]

With the *O'Brien* case, the Supreme Court faced more directly than it had before the issue of what it now labelled "symbolic speech." It recognized that "speech" and "non-speech" elements are often "combined in the same course of conduct," and that in such cases government regulation of the non-speech elements may create "incidental limitations on First Amendment freedoms." The Court then set forth a series of tests that government regulation in this area must pass: (1) it must be "within the constitutional power of government"; (2) it must further "an important and substantial government interest"; (3) it must be "unrelated to the suppression of free expression"; and (4) its restriction on First Amendment freedoms must be "no greater than is essential" to the furtherance of the government interest.

In the abstract these guidelines sounded sensible, and if they had been applied with the deference to First Amendment freedoms and the skepticism toward alleged government interests that one would hope from the judiciary they might have served us reasonably well. Such hopes were dashed, however, by the *O'Brien* decision itself, and they have been all but destroyed by later applications of the *O'Brien* tests in a variety of federal and state courts. The 1965 law against draft card burning which O'Brien had violated was found by the Supreme Court to be a valid exercise of government power—this despite the fact that its legislative history clearly indicated a congressional intent to punish antiwar protest; despite the fact that any legitmate interest the government may have had in the preservation of draft cards was already guarded by a provision of the Selective Service Act requiring registrants to keep their cards in their possession at all times; and despite the fact that a public act of draft card burning was obviously a symbolic event which could have no purpose or significant effect other than to communicate an idea. The Court's willingness in the *O'Brien* case to give the government a pass on tests so freshly devised and so obviously failed set a precedent which has inevitably led to other decisions for the most part unfriendly to nonverbal communication.

The first group of these decisions involved cases of alleged desecration or misuse of the American flag. Ironically, while appellate courts have in most cases overturned convictions in flag cases, they have managed to find ways of doing so that have left intact the dubious proposition that the physical mutilation of the flag is prohibitable "conduct" rather than protected "speech."

The judiciary has been nothing short of ingenious in this endeavor. The U.S. Supreme Court provided the model for obfuscation in 1969 when it reversed the conviction of Sidney Street, who had protested against the shooting of James Meredith in Mississippi by burning an American flag on a New York City street corner. It happened that Street, in addition to burning his flag, had simultaneously spoken words, "We don't need no damn flag. . . . If they let that happen to Meredith, we don't need an American flag." The New York law under which Street had been convicted made it a crime to cast contempt upon a flag by acts or words, and a narrow (5 to 4) Supreme Court majority seized on this unconstitutional "words" provision of the law to overturn the entire conviction. At the same time, both majority and dissenters made clear their view that laws against flag burning per se would not be objectionable.[22]

Two years later the Supreme Court, in a 4-to-4 split, left standing the New York flag desecration conviction of an art dealer who had displayed pieces of the American flag worked into an antiwar sculpture at his Madison Avenue gallery.[23] Meanwhile, a confusing series of lower court opinions on flag desecration appeared. The U.S. Court of Appeals for the District of Columbia found that Abbie Hoffman's flag-shirt did not constitute physical defilement of the flag within the intent of the law;[24] a three-judge

federal district court held a North Carolina statute to be vague and overbroad for "reaching representations of flags that are not flags";[25] a federal district judge in northern California determined the federal flag desecration law to be in perfect harmony with the *O'Brien* tests;[26] and a three-judge federal district court in Delaware declared that state's flag law incompatible with the *O'Brien* tests.[27]

These opinions and a number of others finally caused the Supreme Court to return to the subject in 1974, when half a dozen flag cases had worked their way up to its docket.[28] In a group of decisions and orders late in its 1973-1974 term, a majority ruled that the First Amendment cannot tolerate laws against flag desecration or misuse that are so broad, so vague, or applied in such a way as to punish allegedly contemptuous attitudes toward the flag,[29] or prohibit slogans and symbols superimposed upon the flag,[30] or suppress "the expression of an idea through activity."[31] At the same time the justices reiterated their previously expressed opinion that constitutional protection need not be extended to the physical mutilation of flags if state or federal legislators have clearly and nondiscriminatorily chosen to forbid that conduct. The fact that a flag is but a piece of cloth, a symbol pure and simple, and that therefore any actions taken with respect to it (unless using it to set a building afire) are of necessity also purely symbolic seems to have either escaped the Court or at least not persuaded it that this is what "speech" is all about.

SPEECH WITHOUT IDEAS?

If it has been difficult to gain judicial acceptance for the notion that "speech" can occur without words, it may prove almost as hard to disabuse the judiciary of the generally accepted premise that there can be speech without any significant "ideational" content. The consequence of that notion is that it allows the courts to extend First Amendment protection to speech that they regard as "serious" or of "social value," while denying it to speech that is supposedly devoid of "ideas."

This discrimination between two classes of speech made its first U.S. Supreme Court appearance in *Cantwell* v. *Connecticut*, a 1940 decision involving Jehovah's Witnesses who had been propagating their faith on the streets of New Haven, Connecticut. They had been arrested and convicted for a breach of the peace and for soliciting without a permit. The Supreme Court reversed the convictions, finding that what the Witnesses had said on the streets was squarely within the protections of the First Amendment. In contrasting the speech in this case with the kind that might have been punishable as a breach of the peace, the Court said:

> Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution.[32]

Two years later, in another Jehovah's Witnesses case involving a man named Chaplinsky who called the chief of police of Rochester, New Hampshire, a "Goddamned racketeer" and a "damned fascist," the Supreme Court, this time upholding the conviction, further explained its two tier view of freedom of speech:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that might be derived from them is clearly outweighed by the social interest in order and morality.[33]

This famous paragraph from the *Chaplinsky* decision, with which even Justice Black

concurred, has become the ground in which all ensuing prohibitions against "worthless" speech have been rooted. This is the rationale that lay behind the Court's 1957 landmark decision in *Roth* v. *U.S.*, which declared that "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance," and it has been reiterated in every major obscenity opinion written since then.

The premise that some speech is devoid of ideas has been left unchallenged even by those justices who found themselves uneasy with the outcome of the *Roth* case and who tried to limit its scope in later opinions. For example, in 1964 Justice William Brennan, voting with the majority to overturn the obscenity conviction of a Cleveland Heights, Ohio, theatre manager for showing the French film *The Lovers*, wrote:

> We would reiterate . . . our recognition in *Roth* that obscenity is excluded from the constitutional protection only because it is "utterly without redeeming social importance." . . . It follows that material dealing with sex in a manner that advocates ideas . . . or that has literary or scientific or artistic value or any other form of social importance, may not be branded as obscenity. . . .[34]

Again in 1966, Justice Brennan, reversing a Massachusetts obscenity conviction of a purveyor of the book *Fanny Hill*, observed:

> A book cannot be proscribed unless it is found to be utterly without redeeming social value . . . the social value of the book can neither be weighed against nor cancelled by its prurient appeal or patent offensiveness.[35]

However, Justice Brennan's moderate stance on this issue has been firmly and explicitly rejected by the new Burger Court majority, which has returned to the more sweeping position that communication can be found to be obscene, even if it has a modicum of social value, when it is not sufficiently "serious." Said the four Nixon appointees (Chief Justice Burger and Justices Powell, Rehnquist, and Harry Blackmun), plus Justice Byron White:

> . . . in our view, to equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment and its high purpose in the historic struggle for freedom. . . . The First Amendment protects works which, taken as a whole, have serious literary, artistic, political or scientific value. . . .[36]

This view of the purposes of the First Amendment is not without impressive libertarian support, as we have seen in our earlier references to Chafee and Meiklejohn. Indeed, the statement in the *Chaplinsky* opinion that "it has been well observed" that some speech is "no essential part of any exposition of ideas" is a direct reference to Chafee's language and is footnoted as such. Both Chafee and Meiklejohn clearly contemplated two-level systems for classifying speech—Chafee by distinguishing speech that contains ideas from that which is mere verbal assault, and Meiklejohn by distinguishing speech that is a part of process of self-government from that which is mere self-expression. It is not a great leap from these beginnings to the Burger Court's decision that the First Amendment protects only speech that has "serious" literary, artistic, political, or scientific value.

The most obvious difficulty with all of these systems for categorizing speech into different classes is that somebody must make a value judgment as to whether a particular expression is "serious," contains "ideas," or is something the citizenry "needs to hear." It is the courts, of course, which are called upon to make those judgments, and they are almost certain to be influenced by their own preconceptions.

What is more, the making of such an evaluation presumes an exclusively political or societal purpose for the First Amendment and excludes the possibility that the free speech clause is also intended to protect an individual's right of self-expression, regard-

less of the social value of what is expressed. But much of contemporary thought follows Thomas Emerson's analysis which suggests four functions of freedom of expression in a democratic society: (1) "a means of assuring individual self-fullfillment," (2) "an essential process for advancing knowledge and discovering truth," (3) "to provide for participation in decision making by all members of society," and (4) "a method of achieving a more adaptable and hence a more stable community, of maintaining the precarious balance between healthy cleavage and necessary consensus."[37]

The second and third of these purposes are direct descendants of John Stuart Mill's essay *On Liberty* and represent the traditional philosophical view which was incorporated into the writings of Chafee and Meiklejohn. The first and, to a large extent, the fourth take their inspiration from twentieth-century psychological insights into the nature of personality and culture, and thus constitute a significant modern enlargement of the First Amendment's foundations.

ACCESS V. ABRIDGMENT

In 1967 there appeared in the *Harvard Law Review* an article by Jerome Barron that was destined to become the credo of a major new free speech movement.[38] That movement rallies to the banner of "Access to the Media." The message is simple: the free marketplace of ideas is a romantic myth in a society of 200 million people in which the flow of most information is controlled by a relatively small handful of managers of the mass media. The soapbox orator, leafleteer, sound truck, and minority journal of opinion are anachronisms. Unless one can gain access to radio, television, the pages of a major metropolitan newspaper or a national news magazine, one's voice for all practical purposes is silent.

These are not entirely new ideas. In fact, since the very inception of radio and television it has been assumed that the First Amendment requires not only a right of broadcasters to speak but also of listeners to hear a variety of viewpoints. That premise underlay the creation by the FCC of the "fairness doctrine," which imposes upon stations the obligation to present a balance of views on the controversial issues of public importance which they address. It led to the "personal attack rule," which requires that individuals who are attacked in a broadcast be notified of that fact and provided with an opportunity to respond. It caused Congress to insert Section 315 in the Federal Communications Act, obliging stations that carry political broadcasts in an election campaign to provide "equal time" for any and all opponents.

If there were any doubts about the constitutional validity of these governmental intrusions into the electronic communications marketplace—and many were expressed by broadcasters and legal scholars—they were firmly put to rest by the U.S. Supreme Court in 1969. Responding to the Red Lion Broadcasting Company's challenge on First Amendment grounds to these state imposed fairness obligations, a unanimous Court speaking through Justice White said:

> It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas . . . rather than to countenance monopolization of that market, whether it be by the government itself or a private licensee. . . . It is the right of the public to receive . . . which is crucial here.

What was new about the Barron article was its suggestion that the kind of affirmative government action that had become accepted for the purpose of encouraging diversity on radio and television should be extended to that First Amendment sacred cow, the print media. Barron argued persuasively and with impressive documentation that there was more concentration of ownership in the metropolitan newspaper field than in radio, and that there was no logic to the double standard we had developed in the govern-

ment's relationships to the electronic and print media.

To the argument that radio and television are licensed by the government to use the "public's airwaves" and are thus under greater obligation than the private press to serve the "public interest," the "Access to the Media" movement replies that the press is also the beneficiary of considerable state support—e.g. second-class mailing privileges and the Newspaper Preservation Act. To the contention that government regulations are justified in the electronic media because of the finite amount of air space available, in contrast to the theoretically unlimited possibilities for publication in print, the answer is given that the economic realities make this an academic distinction—that, in fact, there are more diverse communication possibilities now available over radio stations in most major population centers than through the newspaper media.

The push to gain acceptance of these new perspectives has received support in a number of important ways. Perhaps of the greatest long term significance has been the development of public interest law firms devoted to promoting greater access to the media, both print and electronic, as well as community action groups such as the Open Media Committee in the San Francisco Bay Area. ACLU began exploring access issues in 1968, and has been struggling with various facets of the problem ever since. Finally, three major law suits have brought the problem sharply to the attention of the media and the courts.

The first was a case that developed in Chicago as the result of a labor dispute between the Amalgamated Clothing Workers Union and the city's leading department stores over the sale of non-union goods. The goods had been advertised in the Chicago papers, and the union sought to purchase space in the same papers to present its own position. All four of the major metropolitan dailies (two owned by the Chicago Tribune Company and two by Marshall Field Enterprises) refused to accept the union's ad. When challenged in court, the newspapers claimed a First Amendment right to exercise absolute discretion over what went into the pages of their papers, whether editorial or advertising. The U.S. Seventh Circuit Court of Appeals supported the position of the newspapers, and the U.S. Supreme Court denied further review.[40]

A second major court test of the access issue came as the result of a set of challenges to the policy of CBS and ABC of not accepting editorial advertising. The networks apparently believe that there is a clear distinction between product and ideational advertising, and, given their obligations under the fairness doctrine, they want to keep the presentation of controversial material under their own editorial control. The Democratic National Committee and an organization known as Business Executives Move for Peace in Vietnam had tried to purchase time from CBS and ABC to promulgate their messages but were refused. The FCC sustained the networks' position, and the argument went to the U.S. Court of Appeals for the District of Columbia, which ruled that "a flat ban on paid public issue announcements is in violation of the First Amendment, at least when other sorts of paid announcements are accepted."[41]

The FCC and the networks appealed to the U.S. Supreme Court, which reversed the decision in 1973.[42] In complicated majority, concurring, and dissenting opinions, seven justices agreed that neither the Communications Act nor the First Amendment requires broadcasters to accept paid political advertisements. The majority opinion, beginning with the admission that "balancing the various First Amendment interests involved in the broadcast media and determining what best serves the public's right to be informed is a task of great delicacy and difficulty," reaffirms the *Red Lion* position that broadcasters, as government licensees, are properly subject to limitations such as the fairness doctrine which are imposed "in the public interest." The opinion concludes, however, by stating that a requirement in effect forcing broadcasters to become "common carriers," such

as demanded in this case, would be an invasion of their editorial discretion.

The majority consisted of the four Nixon appointees, plus Justices White, Douglas, and Stewart. Justices Douglas and Stewart concurred for reasons quite different from the others. Justice Douglas took the position that the double standard of government regulation vis-a-vis the electronic and print media is indefensible, and that he would eliminate it by lifting controls on radio and television rather than going the opposite route of requiring access to newspapers, and magazines. In other words, he would repudiate *Red Lion* and the fairness doctrine. Justice Stewart said that "my views closely approach those expressed by Mr. Justice Douglas." However, he still agreed, though hesitantly, with *Red Lion* but felt that the obligations imposed upon broadcasters by the decision were near "the outer limits of First Amendment tolerability." He would go no farther down the access road.

Only Justices Brennan and Marshall dissented. They felt that the fairness doctrine by itself does not sufficiently satisfy the public's First Amendment right to be exposed to a diversity of views, and that the retention by broadcasters of exclusive control over which issues, viewpoints, and speakers may appear on the air is a violation of their public trust. Their dissenting opinion, written by Justice Brennan, says: "This separation of the advocate from the expression of his views can serve only to diminish the effectiveness of that expression."

In reply to the argument that the proposed limitation on broadcasters' discretion would constitute a violation of their free speech rights, Brennan's dissenting opinion notes:

> We are concerned here not with the speech of broadcasters themselves but, rather, with their "right" to decide which *other* individuals will be given an opportunity to speak in a forum that has already been opened to the public. . . . . I can only conclude that there is simply no overriding First Amendment interest of broadcasters that can justify the absolute exclusion of virtually all our citizens from the most effective "marketplace of ideas" ever devised.

In June 1974 the most recent and by far the most publicized access case was decided by the U.S. Supreme Court.[43] It involved an obscure Florida law known as a "right to reply" statute, which had been on the books for many years without having been invoked or challenged. In the United States, only Nevada and Florida have had such laws, though both France and Germany have had long experience with the concept. The Florida statute gave political candidates the right to demand free and equal newspaper space to answer criticisms or attacks that may have been made upon them by the newspaper. The *Miami Herald* made such an attack on Pat Tornillo, a candidate for the Florida House of Representatives; Tornillo asked for space to reply, and the paper turned him down, claiming the law to be a violation of freedom of the press. A Florida Circuit Court agreed that the statute was unconstitutional, but the state Supreme Court reversed that decision and thereby brought down upon itself the wrath of editorial page editors all around the country. If ever the press rallied to the defense of the First Amendment—or was it to their own special interest?—this was the time. The so-called right to reply, indeed, the entire access concept, was in their view the very "abridgment" of speech and the press that the First Amendment was designed to prohibit.

Jerome Barron, the "Father of Access," argued Tornillo's case before the U.S. Supreme Court, but to no avail. In a unanimous opinion delivered by the Chief Justice, the Court put an end for a long time to come to the hopes of access advocates for judicial support. In no uncertain terms the decision declares:

> A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated. . . . the Florida statute fails to clear the barriers of the First Amendment because of its

> intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper . . . constitutes the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees. . . .

Although the Tornillo case has seriously dampened the spirits of the access movement, its efforts to achieve a broader spectrum of views in the mass media of communication are not likely to die. Pressures can still be mounted on the media for "voluntary" or "self-imposed" measures to guarantee greater diversity. It may even be that in the future some legislation can be devised that will pass muster with courts friendlier to the idea of access. An issue so complex as to make bedfellows of, on the one hand, Chief Justice Burger, Justice Douglas, and ACLU Legal Director Mel Wulf[44] and, on the other, of Justice Brennan, Spiro Agnew, and the radical left is not likely to go away because of one unfavorable Supreme Court decision.

It may well be that in the area of access, as with the problem of nonverbal conduct, the First Amendment is being called upon to do service for which it is not well suited. The access problem, after all, is basically economic; it is rooted in the fact that wealth in our society is so unevenly distributed. If those who are unable to secure adequate representation of their views in the mass media had more money at their disposal, ways might be found to solve their problem without interfering with the First Amendment rights of those who now control the media. The difficulty is not unlike the problem of political campaigns, in which it has now been recognized that many of the evils we face result from our methods of campaign financing. Until that knot is unravelled, we will not achieve fairness in campaign communication. There is likewise no reason to believe that the more general problem of access to the media is solvable short of addressing its economic underpinnings. That approach will help to unburden the First Amendment of some of the strains to which it is now subjected.

There are those in our society, perhaps most prominently represented by the philosopher Herbert Marcuse, who question the widely accepted libertarian doctrine that freedom of speech is the sine qua non of all our other rights and freedoms. This radical critique suggests, rather, that freedom of speech, as practiced in the United States today, is an opiate of the people. The First Amendment, it is argued, provides us with no more than a catharsis. It is used by those in power to create the illusion that we are free and equal; it is a distraction, letting us say what we want to say while making sure that the most disturbing ideas fall on deaf ears and have no real impact on the nation's decision makers. According to this way of thinking, the First Amendment is not a genuine avenue to social change.

This view appears to make two assumptions about the communication process. The first, which seems untenable in the light of all past experience in this country and elsewhere, is that talk is cheap and that, unless it is backed up by guns, money, or other kinds of political muscle, it has no power to effect social change. If that were true, one would have to wonder why tyrants have always felt so threatened by the mere expression of dissent and have consistently devoted so much energy to its suppression. One would also have to believe that men of words like Plato, Confucius, Jesus, Marx, Nietzsche, Thomas Paine, Gandhi, and Martin Luther King, Jr., have had no significant effect on the course of history.

The second, and more plausible, assumption of the radical critique is that the freedom of speech we practice is a counterfeit enterprise; that the debates in which we engage are over means rather than ends, form rather than substance, appearances rather than essences, and that they are limited in scope, depth, and meaning by cultural brainwashing. Just as Mao Tse-tung discovered that letting a thousand flowers bloom produced several

hundreds too many to his liking, and so destroyed the harvest, we in the United States have our own ways of insuring that the variety of opinions expressed and communicated to large numbers of people is kept within boundaries that are tolerable to those who hold the reins of power.

The struggles currently taking place in our courts and in the public forum over nonverbal communication, vituperative rhetoric, and access to the media will be fair tests of this radical critique. The outcome may well determine the continued credibility of the First Amendment.

Footnotes

1. *Adderley* v. *Florida*, 385 U.S. 39 (1966).
2. *Tinker* v. *Community School District*, 393 U.S. 503 (1969).
3. *Cohen* v. *California*, 403 U.S. 15 (1971).
4. Chafee, *Free Speech in the United States*, p. 21.
5. *Ibid.*, p. 150.
6. *Gitlow* v. *New York*, 268 U.S. 652 (1925).
7. Meiklejohn, *Political Freedom*, p. 42.
8. *Ibid.*, p. 55.
9. *Ibid.*, p. 36.
10. Emerson, *The System of Freedom of Expression.*
11. From Virginia Statute Establishing Religious Freedom.
12. Levy, *Legacy of Suppression.*
13. *Ibid.*, p. 234.
14. *Ibid.*, p. 308.
15. *Stromberg* v. *California*, 283 U.S. 359 (1931). A large number of other states had passed similar laws in the wake of the Russian revolution.
16. *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624 (1943).
17. *Edwards* v. *South Carolina*, 372 U.S. 229 (1963).
18. *Tinker* v. *Community School District*, 393 U.S. 503 (1969).
19. *Cox* v. *Louisiana*, 379 U.S. 536 (1965).
20. *Brown* v. *Louisiana*, 383 U.S. 131 (1966).
21. *U.S.* v. *O'Brien*, 391 U.S. 367 (1968).
22. *Street* v. *New York*, 394 U.S. 576 (1969).
23. *Radich* v. *New York*, 401 U.S. 531 (1971).
24. *Hoffman* v. *U.S.*, 445 F. 2d 226 (D.C.Cir. 1971).
25. *Parker* v. *Morgan*, 322 F. Supp. 585 (W.D.N.C. 1971).
26. *U.S.* v. *Ferguson*, 302 F. Supp. 1111 (N.D. Cal. 1969).
27. *Hodsdon* v. *Buckson*, 310 F. Supp. 528 (Del. 1970).
28. *Cahn* v. *Long Island Vietnam Moratorium Committee*, *Smith* v. *Goguen*, *Spence* v. *Washington*, *Sutherland* v. *Illinois*, *Farrell* v. *Iowa*, *Van Slyke* v. *Texas.*
29. *Smith* v. *Goguen*, 415 U.S. 566 (1974).
30. *Spence* v. *Washington*, 418 U.S. 405 (1974).
31. *Ibid.*
32. *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940).
33. *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942).
34. *Jacobellis* v. *Ohio*, 378 U.S. 184 (1964).
35. *A Book Named "John Cleland's Memoirs of a Woman of Pleasure"* v. *Attorney General of the Commonwealth of Massachusetts*, 383 U.S. 413 (1966).
36. *Miller* v. *California*, 413 U.S. 15 (1973).
37. Emerson, *The System of Freedom of Expression*, pp. 6-7.
38. Barron, "Access to the Media—A New First Amendment Right," 80 *Harvard Law Review* 1641 (1967).
39. *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969).
40. *Amalgamated Clothing Workers* v. *Chicago Tribune*, 435 F. 2d 470 (7th Cir. 1970), 402 U.S. 973 (1971).
41. *BEM* v. *FCC*, 405 F. 2d. 642 (D.C. Cir. 1971).
42. *CBS* v. *DNC*, 412 U.S. 94 (1973).
43. *Miami Herald* v. *Tornillo*, 418 U.S. 241 (1974).
44. See Wulf, "Excess Access," *The Civil Liberties Review*, Winter/Spring 1974, p. 128.

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Basic Reading

Brant, Irving. ***The Bill of Rights: Its Origin and Meaning.*** **New York: New American Library, c1965.**

Brant, the author of a monumental biography of James Madison, is a passionate defender of the Bill of Rights. A sustained and informed sense of outrage shapes his accounts of the lives of Americans whose rights were trampled by Congress and the courts. Although the theme of First Amendment freedoms pervades the work, chapters 8-26 depict in detail the many evils of the doctrine of seditious libel. Chapter 33 discusses the Supreme Court's interpretations of the First Amendment in this century.

Chafee, Zechariah, Jr. ***Free Speech in the United States.*** **Cambridge: Harvard University Press, c1941.**

Chafee's book analyzes the leading free expression cases that occurred between World Wars I and II, as well as the Alien Registration Act of 1940. Chafee believes the First Amendment restricts those powers of government "most liable" to interfere with free discussion and "the discovery and spread of truth on subjects of general concern." But he argues that the right of expression must be "balanced" against other purposes of government, such as "order, the training of the young, protection against external agression." Unlike more recent authorities, he believes questions of "indecency" can be resolved by juries, but he recognizes the risks of criminal prosecutions of books, plays, etc. The domestic repercussions of two great wars—one two decades past, one already raging—clearly dominate Chafee's thoughts: "Let us not in our anxiety to protect ourselves from foreign tyrants imitate some of their worst acts. . . ."

Emerson, Thomas I. ***Toward a General Theory of the First Amendment.*** **New York: Vintage Books, c1966.**

In this brief but seminal essay, Emerson, professor of law at Yale University, has elaborated a comprehensive theory of free expression. He argues that the First Amendment involves four key elements: (1) individual self-fulfillment (which derives from the necessity of the development of the mind through free inquiry and the welfare of the individual within society); (2) the attainment of truth (free exchange of ideas and information is required to correct inevitable human error); (3) participation in decision making ("the right of all members of society to form their own beliefs and communicate them freely to others must be regarded as an essential principle of a democratically organized society"); (4) achievement of a balance between stability and change (the problems and crises of society require open discussion as an element of political legitimation and consensus: free expression is "a leavening process, facilitating necessary social and political change and keeping a society from stultification and decay"). Includes more than 100 pages of excerpts from major U.S. Supreme Court decisions interpreting the First Amendment.

_____. *The System of Freedom of Expression.* **New York: Vintage Books, 1971.**

Written to apply in concrete cases the ideas set forth in the author's *Toward a General Theory of the First Amendment,* this large volume describes in detail the many strands that make up the fabric of freedom of expression. Largely self-contained chapters are devoted to freedom of belief, special problems related to war and national defense, internal security (e.g., loyalty oaths), internal order (e.g., demonstrations), obscenity, libel and privacy, academic freedom, and other topics. Discussion moderators should not be discouraged by the work's size; well indexed, the volume can be easily used as an authoritative reference work on questions of special interest to specific audiences.

Harris, Richard. *Freedom Spent.* **Boston: Little, Brown, 1976.**

In three case histories, political essayist Richard Harris tells the stories of six contemporary Americans who fought to retain the freedoms guaranteed by the Bill of Rights. He compellingly portrays the human dramas while interweaving the legal and historical background of each incident. Chapter 1, "A Scrap of Black Cloth," deals with the dismissal of a high school teacher who wore a black armband during classes to protest the war in Vietnam. Harris' highly readable summary of the history of leading First Amendment cases makes "A Scrap of Black Cloth" an excellent—but somewhat pessimistic—introductory essay for discussion moderators.

Levy, Leonard W. *Legacy of Suppression: Freedom of Speech and Press in Early American History.* **Cambridge: The Belknap Press of Harvard University Press, 1960.**

Professor Levy, who characterizes his work as a "revisionist" study of the origin and original understanding of the First Amendment's clause on speech and press, states that he was reluctantly forced to conclude "that the generation which adopted the Constitution and the Bill of Rights did not believe in a broad scope for freedom of expression. . . ."

In colonial America, Levy writes, the law of seditious libel was vigorously enforced, not by the royal judges, but by the provincial legislatures, which summoned, interrogated, and fixed criminal penalties against anyone who "libelled" their members or actions. After the war of independence, the debate on a bill of rights was so vague and nebulous, according to Levy, that there seemed to be virtually no conception of the rights to be insured. Just a few years after the Bill of Rights was adopted, President John Adams signed a law outlawing seditious libel. Supreme Court Justice Cushing said falsehoods against the government should be punished "with becoming rigour." In his conclusion, Levy argues that the interpretation of the First Amendment cannot be frozen in eighteenth-century meanings. "The principles and not their framers' understanding and application of them are meant to endure."

_____. *Judgments: Essays on American Constitutional History.* **Chicago: Quadrangle Books, 1972.**

This book of lucid, well argued essays includes two articles that cast more light on freedom of expression in eighteenth-century America: "Liberty of the Press from Zenger to Jefferson" and "Freedom in Turmoil: The Sedition Act Era." Basic reading on the origins of the Founding Fathers' thoughts about freedom of speech and the press.

Meiklejohn, Alexander. *Political Freedom.* New York: Oxford University Press, 1965.

A severe critic of Justice Holmes' clear-and-present-danger formula for limiting "dangerous" speech, Meiklejohn develops an appealing and straightforward argument in lectures delivered in 1948. He contends that each of us is simultaneously a governor and one of the governed, and that it is our speech as self-governors concerning the nature of our government that is totally protected by the First Amendment, even "dangerous" speech favoring destruction of the system. "Private" speech, having nothing to do with self-government, is subject to regulation by "due process of law."